No. 205

In the Supreme Court of the United States

October Term, 1925.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiffs in Error,*

VERSUS

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

JOSEPH M. BRYSON,
CHARLES S. BURG,
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Attorneys for Plaintiffs in Error.

ADDENDA.

Add immediately following the first paragraph at top of page 3 of this reply brief, the following:

This court has heretofore held that the denial by it of a petition for a writ of *certiorari* to review a judgment imports no expression of opinion upon the merits of the case.

—*United States* v. *Carver*, 260 U. S. 482, 67 L. ed. 361;

Hamilton Brown Shoe Co. v. *Wolf Brothers & Company*, 240 U. S. 251, 60 L. ed. 629.

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THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

Come now the plaintiffs in error and respectfully submit this their reply brief herein to the brief of defendants in error, and in reply to the suggestion, on page 1 of said brief, that the decision of this court of January 12, 1925 (Lawyers' Co-Operative Publishing Company's 69 Law. ed. 259), denying plaintiffs in error's petition for a writ of *certiorari*, is *res judicata* herein, plaintiffs in error respectfully show to this court that, as stated at page 4 of their first brief herein, the jurisdiction of this court by writ of error is invoked under the provisions of section 237 of the

Judicial Code, 36 Stat. 1156, as amended by Act of December 23, 1914, 38 Stat. 790; Act of September 6, 1916, 39 Stat. 726, and Act of February 17, 1922, 42 Stat. 366, the same being section 1214 of the West Publishing Company's United States Compiled Statutes, 1916, 1923 Supplement, Vol. 1, pages 327-328, reading in part as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; *or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,* may be re-examined and reversed or affirmed in the Supreme Court upon a *writ of error.* The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ.
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> * * * * * * * *
>
> "In any suit *involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error,* re-examine, reverse, or affirm the final judgment of the highest court of a state in which a decision in the suit could be had, *if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made.* (36 Stat. 1156, 38 Stat. 790, 39 Stat. 726, 42 Stat. 366.)"

The omitted portions of the above quoted statute are those providing for review by this court by *certiorari* of proceedings of state courts, and under which provision it was at the time deemed best by plaintiffs in error to also invoke the jurisdiction of this court by *certiorari*, as it did do, with the result that its petition was denied by this court as above mentioned, and plaintiffs in error understand that such denial was on the ground that the proper procedure was by writ of error, rather than by *certiorari*, and that this court's action in denying the *certiorari*, therefore, has no effect upon the merits of this proceeding, by writ of error.

The last paragraph of the above quoted statute was repealed by Act of Congress of February 13, 1925, c. 229, 43 Stat., section 14 of which act reads as follows:

> "*Section 14.* That this act shall take effect three months after its approval; but it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review, or the mode or time for exercising the same, as respects any judgment or decree entered prior to the date when it takes effect."

The order of the Corporation Commission of Oklahoma involved herein was made on June 16, 1922 (R. 64-6); the opinion and judgment of the Supreme Court of Oklahoma, affirming said order, was rendered on December 11, 1923, 229 Pac. 172 (R. 69-77), and plaintiffs in error's petition to that court for a rehearing was overruled on September 30, 1924 (R. 94), and the record on review was filed in this court on November 17, 1924, so that as above stated, it is considered that this proceeding on review is covered by the above quoted statute.

Plaintiffs in error's contention therefore is that the result and effect of the order of the Commission and the decision of the Supreme Court of Oklahoma, is to hold invalid and of no force or effect the contract provisions of Ordinance No. 74, and to hold that regardless of that contract, the 1919 statute of Oklahoma gives the Corporation Commission full power and jurisdiction to make the order complained of, requiring the Railway Company to prepare and file plans and estimates of cost and to endeavor to agree anew with the City on a division of the cost, and on failure to do so, to agree to submit the question of division of the cost to the Corporation Commission. It is the contention of plaintiffs in error that these questions are properly reviewable on writ of error by this court under the above quoted section 237 of the Judicial Code, as amended, and that this question has been settled by the decisions referred to and quoted from at pages 4 and 5 of their first brief herein, it clearly appearing that there has been drawn in question the validity of the Oklahoma statute and Corporation Commission's order, and the authority exercised under the State of Oklahoma on the ground of their being repugnant to the Constitution and laws of the United States, in that they result in the taking of the Railway Company's property without due process of law and without compensation and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and deny them the right of contract, and impair the obligation of contracts in violation of section 10, article 1, of the Constitution of the United States, and the decision is in favor of the validity of the statute, order and authority; and also that the suit involves the validity of the old contract Ordinance No. 74 in that it is claimed that a change

in the rule of law or construction of statutes by the Supreme Court of Oklahoma applicable to the contract would be and is repugnant to the Constitution of the United States, being the Fourteenth Amendment, and section 10, article 1, of the Constitution of the United States, as above mentioned, and the decision is against the claim so made.

In answer to the discussion at pages 4 to 13, under subhead 1 of the defendants in error's brief, reading as follows:

> "No valid contract exists, regardless of questions of police power, under City Ordinance No. 74, to the effect that Comanche Avenue shall never be opened except upon payment by the City of McAlester of the entire cost of the crossing.",

it is deemed sufficient to say that the argument advanced is not sound and defendants in error cannot be heard to say that they ratified and only intended to ratify a part of the old contract Ordinance No. 74, but are not bound by the remaining parts which are not so pleasing to them, and their contention that the ordinance contract is separable into parts so that they may retain the benefits of some parts and reject the burdens of others, is untenable. The very title of the ordinance shows what the entire ordinance is intended to cover, and that in all of its parts it refers to and depends on others of its parts, and the considerations for the mutual undertakings and agreements are shown throughout the ordinance to bear on and support each covenant and agreement. The title reads as follows:

> "An ordinance to provide for street crossings across the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's sur-

veys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes." (R. 48.)

The contract is executed in part and is executory in part. It must be construed in accordance with the general law as a whole and as an entirety, rather than to pick out portions and construe them without regard to other portions, and the intent of the parties must be gleaned from the entire contract. See Elliott on Contracts, Vol. 2, Sec. 1514, reading as follows:

> "The actual contract of the parties must be deduced from the entire agreement and from all its provisions considered together, and not from specific provisions or fragmentary parts of the instrument, because the intention of the parties is not expressed by any single part or provision of the agreement, but by every part and term so construed, if possible, as to be consistent with every other part and with the entire agreement, since the parties could not have intended apparently conflicting clauses in a contradictory sense. Effect must be given to all the provisions and parts of the contract where possible and no part should be rejected unless absolutely repugnant to the general intent. A single word or sentence should not be construed alone, but should be considered with reference to the context."

See, also, section 1515, Elliott, *supra*, reading in part as follows:

> "In the interpretation of any particular clause of a contract, the court is required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made. The construction should make the whole consis-

> tent, giving all parts their due weight. Force and effect should be given to all the words employed by the parties where that is possible. And one part of the agreement may be resorted to to explain the meaning of the language or expressions of another part when both relate to the same subject-matter."

See, also, section 1519, Elliott, *supra*, reading in part as follows:

> "There should be a proper regard for the object which the parties had in entering into the contract as well as the language employed in arriving at its proper construction. Inquiry may be made as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution."

The mere fact that there is a proviso, as quoted at page 28 of plaintiffs in error's brief, giving the Railway Company a right to contest the opening of additional streets, does not nullify its otherwise valid provisions, but on the contrary completely refutes the claim made at pages 19-20 of defendants in error's brief under the heading:

> "The provisions of the ordinance regarding future damages oust the jurisdiction of the courts and are void.",

because the above mentioned proviso in the ordinance specifically retains the right of litigation to determine the necessity for any additional street and the ordinance simply provides that if additional streets, or, in this instance, Comanche Avenue, should be opened, then the terms thereof are fixed, in that the Railway Company agrees to waive its right to damages for its property taken for the street, in consideration of which the City agrees to bear the cost of the construction of the crossing.

Answering the argument of defendants in error at pages 14 and 15 of their brief, under the heading:

"Section 9 void because unlimited as to time.",

by which they refer to section 9 of contract Ordinance No. 74 and contend that the entire contract is void because there is no specified time for complying therewith; it is submitted that the Oklahoma cases cited in that argument are not in point for the reason that it clearly appears from the very wording of the contract Ordinance No. 74 that it was intended to be a perpetual contract, binding both parties and their successors for all time, and in that respect it is in a class similar to the contract construed in *Western Union Telegraph Co.* v. *Pennsylvania Company*, (C. C. A. 3rd Cir.) 129 Fed. 849, which was a contract between a railroad company and a telegraph company providing for the construction, maintenance and operation of a telegraph line on the railroad right-of-way, by which each party was to concede certain rights and to perform certain conditions, and it was held to be one of those classes of contracts which by its terms is shown to be intended to be permanent, and neither party therefore had the right to arbitrarily and at any time terminate it. The following quotations are from that opinion:

> "We think it will sufficiently appear, from a careful consideration of the contract, with its modifications, as set forth in the bill, the circumstances attending its origin, the purposes had in view, and the conduct of the parties throughout the long period during which those purposes seem to have been accomplished, that there was no intention entertained by the parties to the contract, to limit its duration, or confer upon either party, without the consent of the other, the right of revocation. If a contract is not revocable at the will of either

party, or otherwise limited as to its duration, by its express terms, or by the inherent nature of the contract itself, with reference to its subject-matter or its parties, it is presumably intended to be permanent and perpetual in the obligation it imposes. That the life of a contract should depend on the mere will of either party thereto, without the consent of the other, is a limitation so important and drastic that it is hard to conceive why, if the parties intended it, they should not express that intention in the contract itself. * * * The essential nature of the service is such as to indicate that permanency in contractual relations was intended by the contract under which these parties have lived for nearly half a century. We certainly find nothing in the character of the relation established between these parties so long ago, as would indicate that it was terminable at the will of either party, without the consent of the other. If a power of revocation was intended by the parties to this contract, it would seem the natural and logical course, that such power should have been expressly incorporated in the contract itself. Apart from those contracts, which, from their inherent nature, imply a power of revocation, it would seem that the intention of parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit, or power of revocation. Reason and authority would seem to concur in support of this doctrine, and we find no direct and controlling authority to controvert it. The reasoning of the court below has apparently been on a contrary presumption, that is, that every written contract, vesting no interest in realty, and silent as to the time or method of its duration, is to be presumed revocable at the will of either party, upon reasonable notice." (l. c., pp. 861-862.)

Answering that part of defendants in error's argument at page 16 of their brief, reading:

"Section 9 of ordinance void because extending beyond the term of municipal officers.",

attention is again called to the fact that, as is contended in plaintiffs in error's brief at pages 44-6, the contract ordinance is a business contract and not a governmental one, and for that reason is shown by the authorities cited by defedants in error not to be controlled by those authorities.

Answering the argument of defendants in error at pages 16 to 19 of their brief, under the heading:

"Material portions of ordinance void because of penalties provided.",

it is respectfully submitted that the argument and authorities submitted are not in point and defendants in error have entirely misconceived the meaning of the terms liquidated damages and penalties, in that they seek to apply such terms to the amounts mentioned in the contract ordinance as being the sums of money to be paid in the specific performance of the contract, whereas those terms liquidated damages and penalties are only properly applied to provisions in contracts for declaring some sort of forfeiture or sum to be paid in the event of a breach or failure to perform the contract, all of which is more clearly shown by the following quotation from chapter L, Secs. 2125-26, of Elliott on Contracts, Vol 3:

"Sec. 2125. *Liquidated Damages.*—Liquidated damages are those the amount of which has been determined by an anticipatory agreement between the parties. Where the amount is reasonable, and not disproportionate to the injury provided against, the injured party will not be allowed to recover more than the sum fixed and he will be regarded as having been injured to the extent of the amount stipulated, especial-

ly where the damages are incapable of exact computation. If the amount fixed is greatly disproportionate or unconscionable it will be construed a penalty and not liquidated damages, and hence, not recoverable, for the compensation is the basic rule of the law of damages. 'A stipulation on the subject of damages differs from a penalty in this,' says one authority, 'that the parties are holden by it; whereas, a penalty is regarded as a forfeiture, from which the defaulting party can be relieved'."

"SEC. 2126. *Liquidated Damages—How Distinguished From Penalty.*—No positive rules can be deduced from the cases as an absolute guide in all instances to determine whether a contract providing for a stipulated sum for its breach is to be regarded as a penalty or liquidated damages."

Referring to defendants in error's argument beginning at page 21 of their brief under sub-head No. 2, reading as follows:

"Even if the city ordinance be viewed as a contract such as alleged, such contract is void because beyond the power of the city to make and is a surrender to the police power.",

and to the decision of this court in *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, quoted from on page 21 of said brief, it is submitted that the case is not in point here, for the reason that as appears from the opinion of this court therein, the railroad was a domestic corporation of the state in which the cause of action arose and the state had the power, as it did do, by subsequent legislation, to amend the corporation's charter, so as to place additional burdens on it regarding construction of highway crossings over its premises. Such was not the situation in the case at bar, where plaintiff in error Railway Company is and was

a corporation organized and existing under the laws of Kansas, and operating lines of railroad through the old Indian Territory and the City of South McAlester, now McAlester, over which country certain parts of the statutes of Arkansas, so far as applicable, as contained in Mansfield's Digest of 1884, were put in force, but no power in Indian Territory or Oklahoma could alter or amend the charter of the Railway Company.

The cases cited at page 26 of defendants in error's brief are not applicable, as they relate solely to the question of the liabilities of the railroad companies for payment of paving assessments for paving and improving existing streets across or abutting their premises.

The case of *Galveston Wharf Co.* v. *City of Galveston*, 26 U. S. 473, 67 L. ed. 355, quoted from at pages 27-8 of defendants in error's brief, is not in point, as it appears in that case there was some sort of contract under which it was claimed the city was prohibited from exercising the right of eminent domain, whereas in the case at bar, the contract is not prohibitory of but is in furtherance of the exercise of the right of eminent domain, in that the amount of damages has been agreed on between the parties in advance, and also, as pointed out in plaintiffs in error's first brief herein, said contract is in furtherance of the police power in that provision is made for construction of the crossings when legally established.

The case of *Northern Pacific R. Co.* v. *Minnesota, ex rel. Duluth*, 208 U. S. 583, 52 L. ed. 630, at pages 28-30 of defendants in error's brief, and that of *Chicago, B. & Q. R. Co.* v. *Nebraska, ex rel. Omaha*, 170 U. S. 57, 42 L. ed. 948, pages 31-4 of defendants in error's brief, are not applicable

for the reason that in the *Duluth* case, *supra,* there was a provision in the charter of the railway company, as well as a common law duty, requiring the railway company to construct the viaduct at the time the contract was entered into, which is not the case here; and in the *Omaha* case, *supra,* there was a pre-existing statutory duty of the railroad company to construct the viaduct, which was not the situation in this case.

The case of *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* 245 U. S. 20, 62 L. ed. 124, pages 34-6 of defendants in error's brief, and *Cincinnati* v. *L. & N. R Co.,* 223 U. S. 390, 56 L. ed. 481, pp. 56-7, are similar to the *Galveston* case, *supra,* in that the contracts involved purported to prevent the exercise of the right of eminent domain, whereas the contract in controversy here is in furtherance of the exercise of that right.

The case of *Georgia* v. *Chattanooga,* 264 U. S. 472, 68 L. ed. 796, has no application, as that was simply a question of one of the sovereign states, in its private capacity, owning land in another state and not being allowed, under those conditions, to claim any sovereign immunity against the power of eminent domain.

The case of *Minnesota, ex rel. St. Paul,* v. *Minnesota Transfer Railway Co.,* 50 L. R. A. 656, pages 37-40 of defendants in error's brief, is not in point, as it appears from the opinion that the city undertook to contract without any consideration whatever, but as a gratuity, to give away its *existing* right to compel the railway company to maintain *existing* street crossings, which is not the case here, for the reason that Comanche Avenue was not and is not now an *existing* street crossing, and at the time the ordinance con-

tract was entered into there was no statutory authority by which the city could require the railroad company to construct or maintain a crossing. While the Arkansas statutes applicable to railroad corporations were not extended over the Indian Territory, it is interesting to note that the Supreme Court of that state, in *Prairie Company* v. *Fink*, (1898) 65 Ark. 492, 47 S. W. 301, held that under the Arkansas statutes then in force as referred to in that decision, requiring railroads which should construct their roads over highways to also construct street crossings in a certain manner, did not apply where the highway was constructed after the railroad was built. There are decisions to the effect that in the absence of statutory authority, a railroad company cannot be required to construct separate grade crossings over its premises at its own expense. Notes in 28 L. R. A. (N. S.) 300; Notes in L. R. A. 1915E, 788; *L. & N. R. Co.* v. *Hopkins County*, (Ky.) 156 S. W. 379.

The case of *Cincinnati* v. *L. & N. R. Co.*, 223 U. S. 390, 56 L. ed. 481, page 56 of defendants in error's brief, is not in point, for it is similar to the *Galveston* case, *supra*, and the *Philadelphia* case, *supra*, in that it was contended that the right of eminent domain was being exercised in violation of the contract.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

Dated February 23rd, 1926.

[redacted]

New No. 205.

In the Supreme Court of the United States

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

VS.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

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JACKMAN A. GILL,
Attorneys for Defendants in Error.

ERRATA:

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3 Line 21-21 should read:
"contention is made of indefiniteness in the language of the statute, and that there is doubt that the power has been explicitly given the Corporation Commission to make the order, as was the case in Louisiana."

4 Line 6, "no" for "on."

11 Line 23, "ascertainable" for "ascertaining."

21 Line 22, "capable" for "incapable."

31 Line 8, "Subsequently" for "Consequently."

46 Line 20, "contract" for "court."

50 Line 18, "a material" for "the material."

53 Line 12, "therefore" for "therefor."

55 Line 11, "take and hold" for "taking and holding."

58 Line 19, "subjoined" for "joined."

62 Line 12, "deficient" for "difficient."

62 Bottom lines, "judgment" for "judgement."

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No. 729.

New No. 205.

In the Supreme Court of the United States

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

VS.

THE STATE OF OKLAHOMA AND THE CITY OF McALESTER, OKLAHOMA, DEFENDANTS IN ERROR.

JURISDICTION.

This cause was before this court upon the petition of plaintiffs in error for a writ of certiorari to the Supreme Court of Oklahoma at the October term, 1924, and the writ was denied January 12, 1925.

M. K. & T. Ry. Co. et al. v. *State of Oklahoma et al.*, (No. 729) .... U. S. ...., 69 L. Ed. 259 (Mem. Cas.).

If the writ of certiorari was denied not on the ground that it was not the appropriate remedy, but upon consideration of the merits, we would suggest that the question presented on the writ of error is *res judicata*.

The judgment of the Supreme Court of Oklahoma is final to the extent that it affirms the order of the Corporation Commission of Oklahoma though it is to be noted that the Supreme Court of Oklahoma expressly states that it cannot be enforced until a compensation for the right of way is made to the railway company either by amicable agreement or by condemnation proceedings—a matter which will ultimately depend upon the decision of this court of the question presented on this appeal.

STATEMENT OF QUESTION INVOLVED.

The plaintiffs in error set out four specifications of error but these are all plainly resolvable into the single proposition that because of city Ordinance No. 74 (R. 48-52), no part of the expense of the underpass crossing at Comanche Avenue can lawfully be assessed by the Corporation Commission of Oklahoma under the applicable provisions of the Oklahoma Statute for the reason that said ordinance constitutes a contract between the city and the railway company, that in case such a crossing is ever constructed it shall be at the sole expense of the city, and that, in consequence, the order of the Corporation Commission and the judgment of the Supreme Court of Oklahoma, affirming such order, is an impairment of such contract, giving this court jurisdiction to review the judgment. We do not understand that the plaintiffs in error question the general validity of the Oklahoma Statute under which the Corporation Commission of that state ordered the railway company to construct the crossing and to sustain a portion of the expense, except that a contention is made of ~~any~~ indefiniteness in the language of the statute, and that there is ~~any~~ doubt that the power has been explicitly given the Corporation Commission to make the order, as was the case in *Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad and Steamship Co.*, 264 U. S. 393, 68

L. Ed. 756, but principally to contend that the exercise of such power impairs the obligation of the alleged contract in Ordinance No. 74.

Upon this question it is the contention of the defendants in error, first, that independently of all questions of the police power on legal contract is to be found in Ordinance No. 74 such as claimed by plaintiffs in error; and second, that if this court shall construe the ordinance as making such contract, then such contract as it affects Comanche Avenue is void because in contravention of the police power.

I.

No valid contract exists, regardless of questions of police power, under City Ordinance No. 74, to the effect that Comanche Avenue shall never be opened except upon payment by the City of McAlester of the entire cost of the crossing.

In the construction of the ordinance to determine whether such contract has been made, it is material to take into consideration the existing facts and situation leading to the passage of the ordinance, including also those material facts subsequently occurring which should properly be taken into consideration in arriving at its correct interpretation.

The record shows that the ordinance itself was enacted by the City of *South* McAlester, whereas all of the proceedings exhibited by the record, including the title of this cause, are in the name of the "City of McAlester," and the present or existing municipality, known as the City of McAlester, is recognized and

treated throughout as the successor in interest and party to the alleged contract contained in Ordinance No. 74. The record shows that the City of McAlester consists of six wards. That the Missouri, Kansas & Texas Railway line traverses the entire extent of the city from the north to south, the First, Second and Sixth Wards of the city lying on its east and the Third, Fourth and Fifth Wards on its west, the railway thus bisecting the city geographically (R. 15-16). The Chicago, Rock Island and Pacific Railway passes through the city accomplishing a similar division of the city into wards, the Second and Third Wards lying upon its south and the First and Fourth Wards upon its north, and contiguous thereto but not in physical contact with the Fifth and Sixth Wards, which adjoin and lie north of the First and Fourth Wards and which (the Fifth and Sixth) at the time of the passage of Ordinance No. 74 composed what was then known as the Town of McAlester, Indian Territory (R. 16), the two municipalities having been later consolidated as a city of the first class under the name of the City of McAlester (R. 16), under Act of Congress of March 29, 1906, 34 Stat. 91, said Act being as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of consolidation adopted by the City of South McAlester and the Town of McAlester, in the Indian Territory, is approved, and that the City of McAlester is hereby created a city of the first class in the Indian Territory, with legal succession to all public property now belonging to the incorporated City

of South McAlester and the Town of McAlester, and said City of McAlester shall have power to exercise municipal jurisdiction over the area of territory embraced in and platted as the town sites of South McAlester and McAlester by the Choctaw Town Site Commission, according to act of June twenty-eighth, eighteen hundred and ninety-eight, and subsequently.

Sec. 2. That all indebtedness due by either of said municipalities at the date of passage of this bill shall become the debt of the City of McAlester.

Sec. 3. That the present city government of the City of South McAlester shall exercise all municipal powers over the City of McAlester created by this act until their successors are elected and qualified in accordance with existing law, and that at the municipal election held on the first Tuesday in April, nineteen hundred and six, there shall be elected from the territory heretofore known as McAlester four additional members of the city council of the City of McAlester created by this act.

Approved, March 29, 1906."

That the Missouri, Kansas & Texas Railway Company was constructed in the '70's (R. 14) under a grant of right of way through Indian Territory by Act of Congress of July 25, 1866, 14 Stat. 36, and before the City of South McAlester, Indian Territory, or the Town of McAlester, Indian Territory, were laid out as townsites under Act of Congress of June 28, 1898; that in platting the towns the streets were brought up to the railway right of way on each side but not projected across the spaces in the company's right of way, being reserved to the railway company as acreage and amounting in the City of South McAlester, as

shown by the official plats introduced in evidence, to 52.69 acres; and that no right of way for any streets across the railway company's right of way had been acquired by condemnation proceedings or purchase at the time Ordinance No. 74 was passed.

Already, however, as shown by the ordinance itself, a number of crossings were in use by the public, the number and location of which are not shown (except crossings in block 351 between Grand Avenue and Choctaw Avenue) with which promiscuous and unauthorized crossings the railway company was evidently (and properly) dissatisfied, resulting in the passage of Ordinance No. 74.

It will be further helpful to note that that portion of the railway separating the Second and Third Wards for several thousand feet south of the depot at its junction with the C. R. I. & P. Ry. Co., was on a very high embankment, necessitating underpass crossings wherever opened and that one crossing existed in this portion being at Delaware Avenue where a subway crossing already existed through which ran "the town branch" at which the bridge No. ..... of the railway company was located. The leading scope of the ordinance is made apparent from its title which is as follows:

> "An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other cross-

ings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes:

Be it ordained by the council of the City of South McAlester:"

It is observable from the ordinance that the chief and main points dealt with as affecting the existing conditions and adjusting the present needs and requirements of the city, in its then size and population, and the rights and objections of the railway company as to crossings, were comparatively simple, being as follows: The railway company agreed to four crossings, two grade plank crossings at Monroe and Miami Avenues to be constructed by the company at its expense; an overhead bridge crossing at Grand Avenue and an underpass at Delaware Avenue, the expense of the Grand Avenue and Delaware crossings to be equally borne, the railway, however, to advance the costs and to be reimbursed out of future tax levies made by the city. There was an alternate provision that at any time after five years an underpass crossing might be opened at Cherokee Avenue upon an agreed division of the costs, upon condition that the crossing at Delaware Avenue in that event be closed, or else the city might construct an underpass at Cherokee before five years at its own expense.

The express consideration of the railway company for granting these four crossings at Monroe, Miami, Grand and Delaware Avenues, and its contribution to the expense, is contained in Section 5:

"Section 5. * * * the city hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through Block Number three hundred and fifty-one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings, including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right of way, station grounds and tracks of the said railway company, except and provided it shall pay to the said railway company, as agreed stipulated and liquidated damages in any proceedings instituted by the said city for the opening or condemnation of a right of way over, across or under the right of way, station grounds and tracks of the said railway company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agree.... sum, namely:

Should Choctaw Avenue be opened over, across or under the right of way, tracks and station grounds of the railway company, the city shall pay the said railway company as agreed, stipulated and liquidated damages, in the sum of twenty thousand dollars ($20,000.00).

Should any other crossing, alley way or street be opened across the railway company's premises through block number three hundred and fifty-one (351), the city shall pay to the railway com-

pany, as agreed, stipulated and liquidated damages —the sum of fifteen thousand dollars ($15,000.00).

Should any other street or alley way except Washington Avenue or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the railway company, the city shall pay to the said railway company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the railway company to contest the opening of any additional streets other than those herein provided for."

The only immediate, definite, tangible agreement arising from this ordinance and based upon any present consideration was that part found in Sections 1 to 8 relating to the establishment of the crossings enumerated and the closing of all other crossings "then in use." As to whether or not even this part of the agreement was valid or enforcible by either party, had performance been refused, is not material here to inquire as such portion of the agreement was performed, the "other crossings then in use" presumably were closed, the grade crossings at Monroe and Miami Avenues put in, and the Grand Avenue bridge and Delaware crossing and also, subsequently, the Cherokee crossing were completed, and the city's part of the cost repaid in taxes as shown by resolutions of the "City of McAlester" of April 23, 1909

(subsequent to the consolidation of the two municipalities), being plaintiffs in error's Exhibits "1, 2, 3 and 4" (R. 45-48), and being resolutions for the payment of the expense originally assumed by the City of South McAlester and also by the amicable suit in the Superior Court of Pittsburg County, Oklahoma, by the *Missouri, Kansas & Texas Railway Company as plaintiff* v. *the "City of McAlester," defendant* (defendants' Exhibit 6, R. 53-64), for the recovery of the city's proportion of the expense incurred in the construction of the crossings, the expense as set out being as follows (R. 54):

"Delaware Avenue. . . . . .$ 131.30
Grand Avenue. 11036.08
Cherokee Avenue. 8009.05

Total. . . . . .$19,176.43"

of which the city's share was $9,333.69.

It is this performance of this part of the ordinance and this alone which is meant by the insistence made in the brief of the plaintiffs in error that the city has continually ratified the contract. The part of the agreement relating to these particular crossings and the closing of other crossings then in use was the only definite, certain, ~~ascertaining~~ ascertainable portion of the agreement and this part has been performed and no question exists as to it.

Now, then, with reference to the provision as to Comanche Avenue which is contained in Section 9 (R. 51) it is our contention that there is no contract at all, nor any consideration for a contract, and neither, in-

cidentally, is there any contract as to the other crossings which might thereafter be opened, such as Choctaw Avenue or in Block 351 or the other miscellaneous crossings which might thereafter be desired by the city. There are certain conditions laid down as to the crossings at Choctaw Avenue or other streets such as the payment of certain arbitrary amounts and as to Comanche Avenue certain requirements as to the kind of crossing, plans, specifications and expense, but there is no fixed right in the city to have the crossing opened at Comanche Avenue or at any other crossing even upon payment or tender of payment of the stipulated liquidated damages or performance or tender of performance of any and all the things and conditions mentioned, for it is made essential in each case that condemnation proceedings be instituted and the right to oppose the opening of the crossings is specifically reserved to the railway company. This is conceded by plaintiffs in error in their brief at page 29 where they say:

> "It will therefore be seen that while the railway reserves the right to contest the opening of Comanche Avenue, yet if it should ever be legally opened, then the construction of same should be by an undergrade crossing * * * at the sole cost and expense of the city * * *."

Now it is too manifest for argument that if the right to oppose the crossing is reserved there is no unconditional grant of the right to the crossing. It is immaterial whether there be an exercise of the right to oppose the crossing; the right to have the crossing open-

ed upon performance by the city must exist as an actual right in the contract itself, independent of any option to oppose the crossing. The opposition may prove successful and in such event the city fails to get the crossing. Observe the plaintiffs in error say "yet if it should ever be legally opened," etc., that is, opened by law in adverse legal proceedings. But if opened by law, then it is not opened by contract. It is manifest that the city neither obtained then or has now any *contract right* to the crossing upon offer or payment of all of the expense, but merely a right to resort to condemnation proceedings to force the opening, with the added burden that in case it is adjudged in such proceedings that there is a public necessity for the crossing and that the same is necessary for the protection and the safety of the citizens and the development of the city, it may then secure the crossing upon payment of the entire cost thereof, and this without regard to what the law might then be with regard to the assessment of expense or the then respective rights, duties and obligations of the parties; thus giving to the one party the right to comply or refuse compliance according to what may then appear to be to its advantage or disadvantage. Could it be said that an agreement in words which vests in the one party no certain right to demand and receive performance; which is so optional as to the one party, so unilateral in character and so devoid of consideration, contains any of the elements of a true contract, or is indeed a contract at all?

Section 9 void because unlimited as to time.

Again: If the court should be of opinion that such a contract is contained within the terms of the ordinance, then such contract, being without duration as to time, may be terminated by either party at any time. In applying this well known principle, the court, in *Arkansas Valley Town & Land Co.* v. *Atchison, T. & S. F. Ry. Co.*, 49 Okla. 282, 151 Pac. 1028, 1032, said:

> "The contract, however, does not by its terms fix any period of duration between the parties, and its duration is indefinite, so that we are unable to determine just how long the parties contemplated that it should continue. This being true, it might be terminated by either party at any time. *Smith* v. *Cedar Falls & Minn. Ry. Co.*, 30 Iowa 244; *Lawrence* v. *Robinson*, 4 Colo. 567; *Davis* v. *Fidelity Fire Ins. Co. of Baltimore*, 208 Ill. 375, 70 N. E. 359; *Dunham* v. *Orange Lumber Co.*, (Tex. Civ. App.) 125 S. W. 89; *Joliet Bottle Co.* v. *Joliet Cit. Brewing Co.*, 254 Ill. 215, 98 N. E. 263; *Rosenblatt* v. *Weinman*, 225 Pa. 200, 74 Atl. 54; *Victoria Limestone Co.* v. *Hinton*, 156 Ky. 674, 161 S. W. 1109; *Carr, et al.* v. *Louisville & N. R. Co.*, 141 Ga. 219, 80 S. E. 716; *Santaella Co.* v. *Otto F. Lange & Co.*, 155 Fed. 719, 84 C. C. A. 143; *Ingram-Day Lumber Co.* v. *Rodgers*, 105 Miss. 244, 62 So. 230, 48 L. R. A. (N. S.) 435; *Briggs* v. *Morris*, 244 Pa. 139, 90 Atl. 532; *Erwin* v. *Erwin*, 25 Ala. 236; *Howard* v. *East Tenn. V. & G. Co.*, 91 Ala. 268, 8 South. 868; *Smith* v. *Crum Lynne Iron & Steel Co.*, 208 Pa. 462, 57 Atl. 953; *Burton* v. *Kinp*, 30 Mont. 275, 76 Pac. 563; *Woolsey* v. *Ryan*, 59 Kan. 601, 54 Pac. 664; *Darie, et al.* v. *Lumberman's Min. Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357."

Sometimes where parties have entered into a definite contract, upon a lawful subject, based upon a present consideration, and no time is expressed, and time is not of the essence of the contract, performance may be tendered within a reasonable time. *Garland* v. *Hunter*, ... Okla. 201, 187 Pac. 466. But this contract is not of that class, because instead of merely failing to specify the time of performance, it does specify, but names the whole limitless future as the time. Moreover, far more than a reasonable time has elapsed. Twenty-one years have passed, with great changes, both economic and governmental. First came statehood, six years later, and then the policy of the state was expressed in the act approved May 11, 1908, Rev. L. Okla. 1910, Sec. 1432, imposing the whole cost of constructing railway crossings upon the railroads. Then in 1919 the policy of the state was again changed by placing the whole matter in the jurisdiction of the Corporation Commission, and permitting it to assess not to exceed half the cost of construction against the city.

In *City of Sapulpa* v. *Oklahoma Natural Gas Company*, 79 Okla. 196, 192 Pac. 224, the Supreme Court of Oklahoma, citing with approval from a Wisconsin case, said: "Statutes granting to cities the right to make long time contracts binding on the public fixing the rate to be charged by public service corporations, are not looked upon with favor and will be strictly construed."

Section 9 of ordinance void because extending beyond the term of municipal officers.

Again, we say that the ordinance, if it be regarded as a contract, is void, as being an attempt upon the part of the officials of the city in 1901 to bind all their successors in the exercise of governmental functions, which under all the authorities, they could not do. In 7 McQuillin, Municipal Corporations, Section 1254, it is said:

> "Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business of proprietary powers.
>
> "With respect to the former, their exercise is so limited that no action taken by the government body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist."

And in 8 Elliott on Contracts, Section 603, it is said:

> "As a general rule where the contract (of a municipal council or board) relates to governmental or legislative functions, especially if it involves the exercise of discretion, in that regard a municipal board has no power to make a contract extending beyond its own term so as to bind its successors and prevent them from exercising such functions whenever necessary or advisable."

Material portions of ordinance void because of penalties provided.

The sums stipulated to be paid for the crossing at Choctaw Avenue, in block 351 and at any other crossing

elsewhere located, are so manifestly excessive, disproportionate and arbitrary as to amount to nothing more than penalties, notwithstanding they are designated as stipulated and liquidated damages. In the ordinance the cost of the crossing at Cherokee Avenue, an underpass at a wider portion of the railway embankment (R. 43). is estimated at $7,500.00, constructed five or six years later at actual cost of only $8009.05, yet $20,000.00 is imposed as liquidated damages for the crossing at Choctaw Avenue; $15,000.00 for a crossing in Block 351, and $10,000.00 (in addition to the value of buildings and other railway improvements damaged or destroyed) for any other street or alley way (except Washington or Comanche Avenue) regardless of the location or character of any other such crossing, whether grade or otherwise, showing that the amounts were arbitrary and without regard to any actual damage estimated or which then could be estimated, and being greatly disproportionate, as the sum total of the costs of the crossings at Delaware, Grand and Cherokee was only $19,176.43, whereas the railway's estimated cost of the proposed underpass at Comanche Avenue is something in excess of $28,000.00 (R. 36, 43). The exorbitant sums exacted by the ordinance against a comparatively small municipality are on their face prohibitive and should be considered in determining whether or not these exactions are penal or compensatory. Thus it is said in 19 Amer. & Eng. Encyc. Law, 411:

> "It has been held that the magnitude of the stipulated sum should be regarded not only as com-

> pared with the value of the subject of the contract, but with reference to its proportion to the probable consequences of the breach. And where a stipulated sum is so great that it is apparent that the provision was inserted *in terrorem*, it will be held to be a penalty and not liquidated damages."

While the rule of this court formerly would scarcely admit the possibility of a valid contract providing for stipulated damages, yet that rule has been relaxed so that the court will determine for itself from the provisions of the contract whether or not the gross amounts fixed are in the nature of liquidated damages or penalties.

> *Sun Printing & Publishing Asso.* v. *William L. Moore*, 183 U. S. 642, 46 L. Ed. 366.
> *United States, Appt.* v. *Bethlehem Steel Company*, 205 U. S. 105, 51 L. Ed. 731.

When to the financial inability of the city, reflected in the necessity of spreading out the payment of its small share of the crossings then provided for through the draft on its tax resources for several years, is added the fact that the gross sums exacted for the opening of any future crossings, are merely for right of way damages which are in addition to the cost of construction (except as to Comanche and Washington Avenues) and besides the express inclusion "in addition thereto, of damages equal to the actual value of any buildings or other improvements of the railway company damaged or destroyed by the opening of any street or crossing," it requires no stretch of the imagination to say that actual experience in such matters makes clear that these large

sums are plainly prohibitive in their nature—"*in terrorem*" as the law has so aptly expressed it.

The further provision that these respective sums fixed as liquidated damages which are to prevail despite the actual damages which at the time of the taking may be assessed in the condemnation proceedings—a far more accurate criterion of the damages—would seem to clinch the conclusion that they are intended as penalties. If it were a case of work to be immediately done under the contract, or where time was of the essence, so that the parties could properly take into their estimation the probable damage, the actual damage being difficult or impossible of ascertainment, a different intent might be imputed, but where the circumstances exclude the possibility of the parties having taken any of the ordinary elements of damage into consideration, the idea of compensation is forbidden. The court will endeavor from the whole terms of the agreement and circumstances of the parties to determine whether such stipulations are penal in character.

Wise v. *United States*, 249 U. S. 361, 63 L. Ed. 647.

The provisions of the ordinance respecting future damages oust the jurisdiction of the courts and are void.

The latter part of Section 5 substituting the stipulations for damages in the ordinance in lieu of any "judgment, finding, verdict or assesment of damages by any court, jury, commission or other tribunal at the time having authority to assess such damages to the contrary notwithstanding," deprive the courts of the future

of their jurisdiction in condemnation proceedings. To attempt to provide by agreement for condemnation proceedings, and in the same breath sterilize the judgment, is self-contradictory and void upon its face.

> "Contracts by which the parties thereto seek to oust the jurisdiction of the courts and to deny the right of one or both to resort to any court of competent jurisdiction to settle questions of law that may arise thereunder, are declared void as against public policy. Courts guard with jealous eye any contract innovations upon their jurisdiction."
>
> Second Elliot on Contracts, Sec. 725.

Plaintiffs in error cannot consistently say in reply to this that no stipulated damages or penalties are provided in Section 9 with respect to Comanche Avenue, for the reason that they take the position that all of the sections are related and that the agreements contained in Section 9 and in the various other sections are not separable contracts, the considerations being mutually interdependent. If their proposition on this point is sound, then if any material provisions fail because of being void in law, the remaining ones must also fail. If their proposition is not sound, then there is no supporting consideration in the other provisions for Section 9 and it is unenforcible.

The test of consideration is here applied upon the determination of whether a valid contract exists, as of course, no consideration, however great or clearly expressed, could vitalize a contract which might be found in contravention of the police power.

II.

Even if the city ordinance be viewed as a contract such as alleged, such contract is void because beyond the power of the city to make and is a surrender of the police power.

The ordinance in question is undoubtedly within the functions of the police power. The plaintiffs in error so treat it and it is settled law that highway crossings come within the eminent domain or police power of the state. Thus in *New York & Eng. Ry. Co.* v. *Town of Bristol*, 151 U. S. 556, 38 L. Ed. 269, 272, it is said:

> "It must be admitted that the Act of June 19, 1889, is directed to the extinction of grade crossing as a menace to public safety, and that it is, therefore, within the exercise of the police power of the state."

And see also other cases hereinafter cited.

The city ordinance here involved does not present the case of a simple business contract such as suggested by plaintiffs in error, involving one single transaction such as found in most, if not all, of the cases cited in their brief. On the contrary the ordinance while dealing with certain matters incapable of reasonably immediate performance, is in large measure prospective, and comprehending matters which were not only not then performed or performable but executory in their nature and dependent entirely upon future conditions as to whether they would or could ever be performed. Their performance depended upon future needs and conditions, the necessity or propriety of which would depend upon future events and would call into exercise the

judgment and discretion of those who at such future time would be entrusted with the exercise of those police powers which are irrevocably reserved to the people.

The very nature of the things attempted to be done show upon their face that they could not be done. The ordinance undertakes to define the future highways running from east to west and thus provides a complete system or scheme of the highways passing to and fro from all of the east to all of the west half of the city, for as has been seen the Missouri, Kansas & Texas Railway Company is a median line dividing the city into two equal parts. It provides for the opening of four streets (with an alternative that Cherokee Avenue might be opened in consideration of the closing of Delaware Avenue) thus by agreement confining it to four streets and forever closing and vacating all other crossings then in use, thereby permanently fixing the east and west highways of the city. Whether it was upon these four streets that the principal dwellings or business houses should be located or along which the tides of traffic and commerce might wish to go, were questions which the subsequent development and shifting requirements and desires of future generations alone should determine. But under the scheme of highways laid out in the ordinance, the future needs of conveniences of subsequent generations or the positive necessities—the very things for which the police power was brought into existence—would be immaterial and helpless, for these things have already been fixed. It would seem to be manifest upon its face that the agreement that the crossings then in

use should be forever closed and never again be subjected to public use, is so palpably void that the mere statement of it is stronger than any argument could make it. There were certain other streets and avenues upon which no crossing had ever been opened by the public, such as Choctaw, Washington and Comanche Avenues, and others which are not enumerated except as they appear upon city maps introduced in evidence, and as to these, it was provided that they should never be opened except upon certain conditions and the payment of certain stipulated sums, thus making bargains for the future generations, and bargains which there was neither right nor power to make, and which might be burdensome beyond the ability of posterity to bear, for, if it is a matter about which a legal bargain can be made, who shall judge of the reasonableness or the unreasonableness of the terms? Such an agreement if valid would forestall all subsequent legislation and take away the benefit of any future law respecting crossings. As an illustration of this the sections of Mansfield's Digest of the Laws of Arkansas then in force and quoted by plaintiffs in error (Brief, 29-31) were quickly swept away by the advent of statehood and upon that event by the Act of May 11, 1908, Sess. L. Okl. 1907-1908, page 646, Revised Stat. Okl. 1432, it was made the duty of the railway company to construct the crossing at its sole expense, thus reversing Section 9 of the ordinance which required it to be at the city's sole expense. This act remained in force until the law was again changed by the Act of 1919 whereby the Corporation Commission is

given jurisdiction over the matter of crossings and is permitted in its discretion to assess a part not to exceed one-half the expense against the city. Yet by the contention of plaintiffs in error, Section 9 of the Ordinance of 1901, and not the legislation of the future state, must settle the whole question of the relation of the city and the railroad with respect to crossings and those matters of internal development which affect so vitally the life and growth of the city, depriving it of all of the benefits of future legislation, selling its birthright and putting it in swaddling clothes.

Then there was the Act of Congress of March 29, 1906, prior to statehood, consolidating the City of South McAlester and the Town of McAlester as a city of the first class under the name of McAlester, and in this connection we call to the court's attention the ratification of this in the suit of the *Missouri, Kansas & Texas Railway Company* v. *The City of McAlester,* wherein it sues the municipality by its new name and alleges that it is the successor and liable upon the Ordinance No. 74 (R. 53), the suit being filed in 1912, long after the act of consolidation, but it is manifest that with the inclusion of new territory by the consolidation of the two municipalities, the force and effect of any provisions as to the streets which might thereafter be opened, would be abrogated if they were ever of any validity.

As to Section 9 the police power is surrendered even as to the details of performance, leaving arbitrary terms to be imposed by the railway with reference not only to the crossing under the main track but as to such other

side tracks that might be hereafter established upon the grade of Comanche Avenue, meaning of course service tracks for the wholesale business district shown by the record to have grown up in that locality, and necessarily indefinite in number and all of which "shall be constructed upon plans and specifications to be approved by the said railway company," there being no limit as to the nature and extent of those plans and specifications. Under such requirement the railway company may prescribe all manner of requirements which in the judgment of the city or of a disinterested tribunal might not be necessary. That this is not mere conjecture is shown in the testimony of Mr. Z. G. Hopkins, (R. 34-45) a witness at the hearing before the Corporation Commission, who said he was the chief operating officer of the railway company and that from the investigation of the engineering department it would be necessary to lower all of their industry tracks east of the main line leading up to various wholesale concerns north of Delaware Avenue fronting on Main Street. That the railway company has a difficult grade situation and that the dump would have to be raised in order to permit the underpass and also broadened in order to provide for additional main tracks on the dump and the plans submitted included the cost of paving and guttering along the passageway, thus making it within the power of the railway company by the plans and specifications prescribed by it to correct its whole grade situation at that point in its line, to broaden its dump for additional main trackage and also to include paving which under the

paving law as construed by the state and Federal courts is a charge properly assessable against the railway company.

Choctaw Okl. & G. R. Co. v. *Mackey and City of Holdenville*, 256 U. S. 531.
M. K. & T. Ry. Co. v. *City of Eufaula*, 83 Okla. 263.

Yet if Section 9 is a valid and binding contract all of these matters as well as the entire cost is solely within the discretion and judgment of the railway company and the authorities of the city have no voice and the future laws themselves governing the matter are powerless. The city's estimate of this cost is vastly less because by a small depression (R. 44) in the surface of the underpass crossing and a small cost for drainage, there is no necessity whatever for elevation of the tracks nor reconstruction of the dump, notwithstanding these other things contended for by the railway would improve its own facilities and equipment.

The alleged contract is therefore void because it is a surrender of the police power involving matters so vitally affecting the safety, progress and social and industrial development of the city. In none of the many cases in this and other courts where municipal contracts have been held in violation of this principle and void is there to be found one which goes so far or is so flagrant as this. None have attempted to close by wholesale streets already in use or to limit or condition the opening of other streets never previously opened, or to say, as this ordinance does, that "the city further agrees that

it will hereafter open no other street crossings or alley ways" over a railway extending clear across the city, except upon the payment of certain arbitrary sums; or to say as Section 9 does "that if at any time in the future the city *shall desire* to open and establish a crossing over Comanche Avenue or Washington Avenue * * * it *may* do so upon the following terms," to be then dictated by the railway at the sole cost of the city, is in the very words used an abdication of the power. It plainly says so.

In *Galveston Wharf Co.* v. *City of Galveston*, 260 U. S. 473, 67 L. Ed. 355, there was a contract between the wharf company and the city by which it was provided that the ownership of certain property was to be inalienable except by a four-fifths vote of the qualified voters of the city. Under a certain amendment of its charter the city was about to take the property upon a majority vote and the wharf company undertook to enjoin the same upon the ground that it would impair the obligation of its contract and deprive the plaintiff of its property without due process of law, contrary to the Constitution of the United States; further alleging that it had made large expenditures to improve the property at its own cost, and the Supreme Court said:

> "Without going into greater detail we will assume that the alleged contract was made and bound the city, and that its terms will be departed from if the city should exercise the new power. The bill alleges that the proper officers will declare the amendments adopted, and that, unless restrained, the city 'will attempt to partition said property or

condemn the same, or both,' and prays for an injunction against attempting to enforce the amendments in any manner so far as the above-mentioned property is concerned. The case was heard upon the pleadings and documentary evidence, but it is unnecessary to state them further since the decree went upon the ground that the bill did not state a case within the jurisdiction of the court.

"We are of opinion that the decree was right. If the bill can be taken to allege sufficiently any threat and intent of the defendant, it does not show that the city will go beyond an exercise of the right of eminent domain. The allegation is, 'will attempt to partition or condemn.' If questions can be raised about the constitutionality of the ordinance authorizing partition, the city may confine itself to condemnation, and will, so far as appears. But there is nothing to prevent the exercise of eminent domain by the legislative power. *West River Bridge Co.* v. *Dix*, 6 How. 507, 12 L. Ed. 535; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35. These cases not only dispose of the objection based upon the contract, but also show the difference between an attempt to transfer property from one private person to another, and the taking it for public administration by a public body. 166 U. S. 694. There is no question about the principle, and therefore there is no substantial Federal question raised by the bill. This seems to us so plain that we have not thought it necessary to consider whether the suit was prematurely brought."

In *Northern P. R. Co.* v. *Minnesota ex rel. of Duluth*, 208 U. S. 583, 52 L. Ed. 630, the City of Duluth agreed with the railway company for the construction of a viaduct on Lake Avenue at their joint expense, the rail-

road at the time denying its obligation to build the viaduct, the contract further providing that the city should maintain the part of the bridge over the railroad's right of way for fifteen years and to perpetually maintain the approaches. The bridge was built at an expense of $23,000.00 to the city and $50,000.00 to the railroad company. Before the fifteen years had expired the viaduct having become dangerous for travel, the city under a power conferred on it by law that required railroad companies to construct bridges and viaducts at their own expense at public crossings, passed a resolution requiring the railroad company to immediately repair said viaduct and approaches in accordance with specifications adopted by the city, and a mandamus action was begun to require the railroad company to make the repairs. The contract was set up by the railroad company in defense with suitable allegations of violation of its constitutional rights by the impairment of the contract. In passing upon the case this court said:

> "This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen

> years, and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this *legislation does, is to require the railroad to* incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming, for jurisdictional purposes, that the company had a valid claim of contract, it was impaired by the legislation of the city in question; we therefore think there is jurisdiction in the case."

It was earnestly contended by the railroad company that "whatever the rule might be as to requiring a railroad company to construct such overhead bridges in the interest of public safety as to streets in existence when the railroad was built, it could not be required to do so when the roadway was contracted *after* the railway had acquired its right of way and laid its tracks." This court after reviewing the authorities and deciding against that contention further said with reference to the violation of the contract between the city and the railroad:

> "But it is alleged that at the time this contract was made with the railroad company it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of the police power cannot be limited by contract for reasons of public policy; nor can it be destroyed by compromise; and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety. *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. Rep. 513."

A very similar contract was before this court in *Chicago, R. & Q. R. Co.* v. *Nebraska, ex rel. City of Omaha*, 170 U. S. 57, 42 L. Ed. 948, except that the contract between the city and the railway company for the construction of a viaduct along 11th Street by which the company was to pay three-fifths of the entire cost and the city the remainder, did not provide who was to maintain the viaduct after construction. ~~Consequently~~ Subsequently under another law of the State of Nebraska giving enlarged powers to cities of a population of 60,000 or more, the City of Omaha ordered the railway company to repair the bridge at its own cost in accordance with plans and specifications of the city and instituted mandamus proceedings to compel the same. When the case reached this court it was said:

> "No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?
>
> "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are

persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature.

"We do not indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the state. It is argued that 'while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the Federal jurisdiction unless adopted under the compulsion of state necessity; that while it is not questioned that the maintenance of the viaduct is essential to the safety of the community, yet if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal constitution.' "

The railroad company contended that when the viaduct was constructed that it became a part of 11th Street and the city became bound, under its duty to maintain streets, to keep the viaduct in repair, whereas, the city contended that by the statute of Nebraska duty was cast upon the railroad to keep in good repair all bridges with their abutments.

With reference to this contention the court after observing that the parties in consideration of their mutual duty to the public having participated in the expense of the construction of the viaduct, there would seem to be a reasonable implication of a common obligation to keep it in repair, in other words an implied obligation under the contract that the city would bear part of the expense of the upkeep, and if so the city would be acting in disregard of its contract in requiring the railroad to repair the viaduct and approaches at its own expense. Continuing its opinion the court said:

> "However this may be, we think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

> This subject has been so often considered by this court that it seems needless to here enlarge upon it. It is sufficient to cite a few of the cases. *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25 (24: 989); *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659 (24:1036); *New Orleans Gaslight Co.* v. *Louisana Light Co.,* 115 U. S. 650 (29:516); *Mugler* v. *Kansas,* 123 U. S. 623 (31:205)."

In another case, that of *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* 243 U. S. 20, 62 L. Ed. 124, there was an alleged contract between the state itself and the hospital which having been organized under the laws of Pennsylvania in 1841, segregated a tract of land in the City of Philadelphia for hospital for the insane and the legislature in 1854 upon the solicitation of the hospital passed a law specially forbidding the opening of any street or alley through the hospital grounds without the consent of the hospital authorities. The case arose upon the action of the city in opening a street through the hospital grounds in such way as not only to condemn the land desired for the streets but the rights of the contract of 1854. This court in affirming the judgment of the state Supreme Court said:

> "The conclusions of the court were sustained in a *per curiam* opinion pointing out that there was no question involved of impairing the contract contained in the act of 1854, since the express purpose of the city was to exert the power of eminent domain not only as to the land proposed to be taken, but as to the contract itself. The right to do both was upheld on the ground that the power of eminent domain was so inherently

governmental in character and so essential for the public welfare, that it was not susceptible of being abridged by agreement, and therefore the action of the city in exerting that power was not repugnant either to the state constitution or to the contract clause of the Constitution of the United States.

"It is apparent that the fundamental question, therefore, is, did the Constitution of the United States prevent the exertion of the right of eminent domain to provide for the street in question because of the binding effect of the contract previously made, excluding the right to open the street through the land without the consent of the hospital? We say this is the question, since, if the possibility were to be conceded that power existed to restrain by contract the further exercise by government of its right to exert eminent domain, it would be unthinkable that the existence of such right of contract could be rendered unavailing by directing proceedings in eminent domain against the contract, for this would be a mere evasion of the assumed power. On the other hand, if there can be no right to restrain by contract the power of eminent domain it must also of necessity follow that any contract by which it was sought to accomplish that result would be inefficacious for want of power. And these considerations bring us to weigh and decide the real and ultimate question: that is, the right to take the property by eminent domain, which embraces within itself, as the part is contained in the whole, any supposed right of contract limiting or restraining that authority.

"We are of opinion that the conclusions of the court below, in so far as they dealt with the contract clause of the Constitution of the United States, were clearly not repugnant to such clause. There can be now, in view of the many decisions of this court on the subject, no room for challeng-

ing the general proposition that the states cannot, by virtue of the contract clause, be held to have divested themselves by contract of the right to exert their governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties" (citing many decisions).

In *Georgia* v. *Chattanooga*, 264 U. S. 472, 68 L. Ed. 796, one of the late expressions of this court, it was said:

"The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land for railroad purposes. Having acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation. The terms on which Tennessee gave Georgia permission to acquire and use the land, and Georgia's acceptance, amount to consent that Georgia may be made a party to condemnation proceedings.

"The power of eminent domain is an attribute of sovereignty, and inheres in every independent state. *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206, 207; *United States* v. *Jones*, 109 U. S. 513, 518, 27 L. Ed. 1015, 1017, 3 Sup. Ct. Rep. 546; *Shoemaker* v. *United States*, 147 U. S. 282, 300, 37 L. Ed. 170, 185, 13 Sup. Ct. Rep. 327; *Cincinnati* v. *Louisville & N. R. Co.*, 22 U. S. 390, 404, 56 L. Ed. 481, 485, 32 Sup. Ct. Rep. 267. The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be

essential to the life of the state. It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 62 L. Ed. 124, 38 Sup. Ct. Rep. 35; *Galveston Wharf Co.* v. *Galveston,* 260 U. S. 473, 67 L. Ed. 355, 43 Sup. Ct. Rep. 168. It is superior to property rights (*Kohl* v. *United States,* 91 U. S. 367, 371, 23 L. Ed. 449, 451); and extends to all property within the jurisdiction of the state—to lands already devoted to railway use, as well as to other lands within the state (*United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 685, 40 L. Ed. 576, 582, 16 Sup. Ct. Rep. 427; *Adirondack R. Co.* v. *New York,* 176 U. S. 335, 346, 44 L. Ed. 492, 498, 20 Sup. Ct. Rep. 460)."

In the case of *State of Minnesota ex rel. St. Paul* v. *Minn. Transfer Ry. Co.* (Minn.), 50 L. R. A. 656, the City of St. Paul agreed with the company for the construction of an overhead bridge crossing over University Avenue, the city to construct all necessary approaches on both ends of the bridge and bear certain other expenses with certain restrictions inserted as to future uses by other railroads or motor lines, and the bridge was constructed at an expense of about $98,000.00 to the railway and of about $25,000.00 to the city. It was alleged by the railway company (and so found by the court) that it was much more of a structure than the railway company deemed necessary for public use at the time, but that it participated in the same, relying upon the good faith of the city that the city would thereafter maintain and repair the bridge at its own expense for all future time. And the city did there-

after maintain the bridge at its own expense, and the Supreme Court treated the case as being an agreement of the city to maintain the bridge "for all future time." Afterwards the city by an ordinance, required the railway company to repair the bridge in accordance with certain plans and proceedings prepared by it, and instituted mandamus proceedings to require the railway to do so, and had judgment which was sustained on appeal. We subjoin a copious quotation from the opinion, 50 L. R. A. 659:

> "While having under consideration defendant's claim of a grant of perpetual immunity from its otherwise binding obligation to keep the bridge in repair, we shall assume what is denied by the city attorney in his argument—that the city did enter, in so far as it could, into a contract with defendant corporation to build a part of this bridge as proposed by defendant's president, and that in this contract the city accepted and agreed to abide by the conditions contained in the proposition, hereinbefore quoted in full—one being that it was to maintain the structure 'for all future time'—and that the bridge in question was built and completed in strict compliance with a duly executed contract, in all matters of form. The question then is, was it within the power, express or implied, of the city officials to enter into an agreement of this character which would be of any validity? Not only did the council appropriate city funds to and in the construction of a bridge which, in so far as it crossed the railway tracks was made necessary by defendant's acts, and which, as a consequence, defendant was obliged to wholly construct, but it accepted conditions, and attempted to bind the municipality for all future time to maintain this bridge at that par-

ticular point. Without regard to what might be needed by the public at some future period, the council attempted to bind the city to repair and to keep in existence for all time a bridge but one-half as wide as the avenue across which defendant had laid a large number of tracks, evidently used as part of its transfer yard, and not merely for ordinary crossing purposes. The council went further than this. It attempted to bind the city not to cross the tracks at the surface grade or otherwise, nor to allow any street car or traction company so to do, or to so cross at any other grade than that fixed by the height of the bridge.

"If such a contract should be upheld, the city, without any consideration whatever, and as a gratuity, gave away and waived, as was said by the court below, 'a most valued right given to it at common law, viz., the right to compel the respondent to provide and forever maintain suitable and safe crossings on University Avenue over its tracks and other grounds, a distance of over 1,300 feet, and it relieved the respondant for all time from any and all obligations in that behalf.' Such an arrangement, ignoring entirely the question of consideration, was *ultra vires*. It was not binding on either party. It cannot be that the common council of 1888, by the passage of a resolution providing for the construction of a bridge 60 feet in width in a street 120 feet wide to be perpetually maintained by the city, could limit or control the legislative action of its successors, or could abdicate its right, as future necessity should require to compel the construction and maintenance of a bridge or viaduct of such dimensions, width, and construction as should, as nearly as may be, restore the street to its former condition of usefulness. We have already held that the power of municipal authorities to contract

in relation to a given matter does not carry with it by implication power to make a contract, even with reference to such matter, which shall cede away, control or embarrass their legislative or governmental powers, or render the municipality unable in the future to control any municipal matter over which it has legislative control (*Flynn* v. *Little Falls Electric & Water Co.*, 74 Minn, 186, 77 N. W. 38, 78 N. W. 106; *State ex rel. St. Paul* v. *St. Paul City R. Co.* (Minn.), 81 N. W. 200); and also that a municipal corporation intrusted with power of control over public streets cannot, by contract or otherwise, irrevocably surrender any part of such power, without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the state (*Nash* v. *Lowry*, 37 Minn. 261, 33 N. W. 787). And, of course, it is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. Future conditions may require that the public thoroughfare be restored to its normal condition, so that there may be a grade crossing for all persons who may have occasion to cross on foot or vehicles. This would compel the defendant's tracks to be put overhead or underneath the surface. And it is not improbable that in time the traveling public may need, for its use, the full width of the avenue, 120 feet, instead of the 60 feet now accorded. These things would be absolutely prohibited should we sustain defendant's contention. The alleged contract was and is invalid."

The alleged contract is impossible of ratification.

It is pressed in the brief of plaintiffs in error that the City of McAlester has continuously ratified the al-

leged contract. Relative to this contention we have already observed herein that the only acts of ratification alleged or shown in the record was the action of the city in paying its proportion of the expense of the construction of the crossings at Grand, Cherokee and Delaware Avenues in accordance with the agreement as shown by the resolutions of the city council of the City of McAlester subsequent to the consolidation of the City of South McAlester with the Town of McAlester under the Act of Congress and by the friendly suit brought against the new municipality in 1912, the railway company having advanced the costs for the execution of this part of the agreement, but it is a sufficient answer to this contention that if the ordinance or any part of it was void, ratification cannot impart vitality. Thus in *Newport* v. *Railway Co.*, 58 Ark. 270, the Town of Newport had made a contract with the Batesville & Brinkley Railway Co. to construct a levee on two sides of the town to protect it from overflow, and to pay the company therefor in warrants of the town $10,000, and the railway company was to have the privilege of using the levee as a road bed for its railway. One line of the levee was completed, accepted and paid for by the town, after which it refused to accept and pay for the other line of the levee, and the company having completed the levee according to the contract, brought the suit to recover a balance of $4480.00 alleged to be due on the contract. The answer of the town admitted its attempt to execute the contract, but says the contract was made for the purpose of inducing the railway company to locate

and construct its railway through the town and to establish a station there, and denies the power of the town to make the contract. In holding that the contract was *ultra vires* and that the railway company could not recover, the court, among other things, said:

> "Had the incorporated Town of Newport the power to make the contract which was the foundation of this suit?
>
> "In 1 Dillon, Mun. Corp., Sec. 89, it is said: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.'
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> "In *Minturn* v. *Larue*, 23 Howard, 435, the court said: 'It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the records of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.'
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> * * * * * * *
>
> "Was the contract such as could be ratified by accepting the benefit of work done under it, or is the town estopped by permitting the work to be done under it and accepting the benefit of such work?

"In *Schumm* v. *Seymour*, 24 N. J. Eq. 144, it is said: 'It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, or its officers, to make the contract. And a contract beyond the scope of the corporate powers is void.' 'The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who, in so doing, were contravening public policy, as well as known positive law."

* * * * * * *

"Judge Dillon, in Sec. 463, 1 Dillon on Municipal Corporations, states the law in this behalf plainly and tersely, thus: 'A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise.* * * * But a subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting the corporation is not bound. In such cases the statute must be strictly followed; and a person who deals with a municipal body is obliged to see that its charter has been fully complied with; when this is not done, no subsequent act of the corporation can make an *ultra vires* contract effective.'

"As the contract sued on in this case was without the scope of the corporate powers of the incorporated Town of Newport, it could not be ratified, and the town was not estopped to deny its invalidity by having accepted and received the benefit of work done under it, with the knowledge and consent of the town."

This Arkansas case construing municipal contracts was decided under the provisions of Mansfield's Digest which governed in the City of South McAlester at the time of the passage of the ordinance. The same rule of construction prevails throughout the Oklahoma cases.

O'Neil Engineering Co. v. *Incorporated Town of Ryan, et al.*, 32 Okl. 738, 124 Pac. 19.

City of Enid, et al. v. *Warner-Quinlan Asphalt Co.*, 62 Okl. 139, 161 Pac. 1092.

Michael v. *City of Atoka*, 76 Okl. 266, 185 Pac. 96.

Hyde v. *City of Altus*, 92 Okl. 170, 218 Pac. 1081.

No Vested Rights Under the Alleged Contract.

Plaintiffs in error also urge that rights have vested whereby the provisions of Section 9 of the ordinance have been made valid. It would seem perfectly obvious that if the alleged contract which the railway company has interposed as a defense against the enforcement of the order of the Corporation Commission of Oklahoma, and the judgment of the Supreme Court of Oklahoma, was *ultra vires* and void that no rights have vested under it. How can there be a right vested or otherwise in a contract which is void? The decisions make clear that no consideration or anything can validate such an agreement; that the state itself cannot do so, and that railway companies and others in entering into such contract do so with full knowledge of their invalidity.

Estoppel Cannot Be Invoked.

The contention of plaintiffs in error that the city is estopped to dispute the validity of the contract does not

apply to a contract void under the police power. Nothing can save such a contract.

Newport v. *Railway Co.*, 58 Ark. 270.
Schumm v. *Seymour*, 24 N. J. Eq. 144.

The cases of *State, ex rel. City of Carthage* v. *Cowgill and Hill Mill Co.*, 55 (57) S. W. 1008; *First National Bank of Red Oak* v. *City of Emmetsburg*, 138 N. W. 451, cited by plaintiffs in error each related to executed contracts not affecting railway crossings or otherwise involving the police power, but were merely concerned with the ordinary control, supervision and upkeep of the streets and with all due deference have no application.

Discussion of authorities of plaintiff in error or ultra vires of contract under police power.

Plaintiff in error cites and quotes from *Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad & Steamship Co.*, 264 U. S. 393, 68 L. Ed. 756. While there is a reference in the decision of this court to the contract made between the city and the railway company, we do not understand that the validity of the contract was the point immediately before the court or that its validity as tested under the police power was passed upon. On the contrary, as we read the case, the controlling question up for the court's decision, was whether or not the language of the Louisiana Constitution of 1921 and of the Act of 1918 adopted by reference in the 1921 Constitution, was sufficiently definite to convince the court that the Public Service Commission had thereby been given control over the

streets within the City of New Orleans, which was an ordinary governmental function of the City of New Orleans and that until the Supreme Court of Louisiana has placed such construction on the Louisiana Constitution and statute, which the court said had not been done in the case of *Gulf C. & S. F. R. Co.* v. *Louisiana Pub-Serv. Commission,* 151 La. 635, 92 Southern, 943, no such control had been bestowed upon the commission. Especially would such construction be adopted when the same would lead to a disregard of an existing contract, but we do not view the decision as holding that in case such power and control had been expressly given to the Public Service Commission that the contract would have been a sufficient defense against the enforcement of the law or that the contract would have been impaired thereby. This interpretation of the decision is ventured with all proper modesty but with the conviction that such is its effect and that it is not an authority of this court to the point that the contract was passed upon or upheld; but even if so it is further submitted that the ~~court~~ contract is so far from being analogous with the alleged contract in the instant case, that the court would not be inclined to apply it here.

The decision in the case of *City of Argentine* v. *Atchison T. & S. F. R. Co.,* 41 Pac. 946, related to the building of certain viaducts by the railway under an agreement that upon completion the City of Argentine would contribute and pay to the railway company $3,000.00 of the costs. The viaducts were built and installed in use and at a special election in the city bonds to

pay the $3000 claim of the railway company were voted and issued and taxes levied to pay the bonds and the sum of $3000 had been set apart and placed in the hands of the city treasurer. The city had statutory option and power to compel the railroad company to build the viaducts at its expense or to construct them at its own expense. Of the correctness of the decision holding that the city was liable under such circumstances to pay over to the railroad the $3000 is clear. The court expressly said, however, "it is unnecessary to determine the validity of the provisions as to future maintenance and upon that question we express no opinion." We cannot see, however, how the City of Argentine case is in point.

The case of *Hicks* v. *Chesapeake & O. Ry. Co.*, (Va.) 45 S. E. 888, was a suit against the railway company to recover damages for the negligent failure to keep in repair a certain bridge in the Town of Scottsville. The Town of Scottsville was not a party. Among the defenses set up was an ordinance of the town and a deed releasing the railway company's predecessor in title from any obligation to keep the bridge in repair and assuming such duty by the town. The consideration for such contract being the dedication by the railway to the town of the highway on which the bridge was located, which highway was accepted and after such dedication and acceptance the town itself erected the bridge in question. The town had never disavowed the arrangement and was not a party to the action and the case in our judgment, with all deference, is not in point.

The remaining case of *Florida East Coast Ry. Co.* v. *City of Miami,* (Fla.) 79 So. 682, turned upon the construction of the word "operate" occurring in an agreement between the city and the railway company, whereby it was provided that a crossing at 11th Street should be "put in, operated and maintained without expense" to the railway company. Where it was proposed to extend 11th Street across the railway, the company owned the land whereon it had not only its tracks and yards, but a part of the platform of the passenger station, and in order to remove the operations of the railway, the movement of locomotives and trains and switching of cars from close proximity to the business portion of the city, it entered into a contract with the railway by which it obtained the right to open 11th Street, whereupon the railway delivered to the city a deed of dedication for street purposes for extending the street across its right of way, removing its switching operations, station and tracks from the heart of the city to a point four or five miles distant, and the city constructed and thereafter maintained the crossing and employed a watchman at the crossing at the expense of the city. Subsequently, in order no doubt to relieve itself of the expense of a watchman, it passed an ordinance requiring all railway companies operating over streets in the city to provide and maintain safety gates at all street crossings. Two of the five judges dissented. The majority opinion while vindicating the principles that the police power cannot by contract be infringed upon, distinguished the case by saying that the City of Miami, in-

stead of abrogating, was on the contrary exercising its police power, and that the matter of who pays the expense did not determine that question.

The reasoning of the court, as an analysis will show, was based upon the proposition that "as long as the railroad owned the land and there was no street over it, it owed no duty and the city had no rights to be surrendered by the contract." The conception that there is no right to open crossings and charge the railway with the expense where the railway was constructed before the laying out of the street finds only small support in the United States and is in disagreement with the Supreme Court of the United States and of the State of Oklahoma, and with the majority rule in the United States as we will hereafter point out.

Northern Pac. Ry. Co. v. *Minnesota ex rel. Duluth,* 208 U. S. 583, 596, 52 L. Ed. 630, 636;

Chicago R. I. & P. Ry. Co. v. *Taylor,* 79 Okl. 142, 192 Pac. 349 (where the authorities are cited in great array).

Aside from this the facts of the Florida case so clearly distinguish it from the case at bar as to make it inapplicable. Had the Supreme Court of Florida been dealing with a city ordinance whereby all street crossings then in use in the City of Miami were forever closed and vacated and further providing that all other streets which ever thereafter at any time be opened except upon expressed conditions, terms and stipulated damages therein provided, "any judgment, finding, verdict or assessment of damages of any court, jury, com-

mission or other tribunal at the time having authority to assess such damages to the contrary notwithstanding and whether for more or less than the agreed sums" an altogether different case would have been presented and a different decision reached unless indeed the Florida court should follow to the utmost extent, the suggested theory that the police power did not extend to any crossing laid out after the railroad was built.

An examination of the case of *Hitchcock* v. *Galveston*, 96 U. S. 341, 24 L. Ed. 659, shows that the city was vested with full power of authority to grade, repair or otherwise improve the streets and to defray the cost of construction and incidental expense by the sale of a lot fronting on the improvement and vesting good title to the purchaser of the lot. The city being thus specifically invested with both the duty and the power to pave the street, entered into the contract and after the contractors had performed the material part of the contract and were going on in earnest to complete it, the city undertook to annul the contract and the contractors sued for damages. This was a case falling within the express powers of the city to pave the streets and an executed contract so far as the contractors were concerned, and as to the power of the city to make the contract this court said: "We spend no time in vindicating this proposition." The main controversy seemed to turn upon the provision for the issuance of bonds to pay for the work and the lower court held the contract inoperative because the city had agreed to pay for the work in bonds and it was held by the court that the issue of

such bonds was transgressive of the power of the city, but as this court observed, the suit was not brought upon the bonds.

We cannot see the applicability of the case of *Atlas Life Insurance Co.* v. *Board of Education, City of Tulsa,* .... Okl. ...., 200 Pac. 171, which involved the power of the Board of Education to execute a valid 99 year lease. The power to alienate or dispose of real or personal property having been conceded and the real estate in question having become unsuitable and not needed for school purposes, the Supreme Court of Oklahoma held that the power existed to execute the lease. We fail to perceive any similarity of question in that case and the case at bar.

The case of *Washington Water Power Co.* v. *City of Spokane,* (Wash.) 154 Pac. 329, deals with the method of payment for certain land purchased by the city for laying out a new street and the city having accepted the land and constructed the new street on it, the court held that it must pay. The contract related to a single transaction within the power of the city and wholly executed. We respectfully submit that the case is not in point.

The case of *Enid City Railway Co.* v. *City of Enid,* 43 Okl. 778, 144 Pac. 617, there was a contract whereby to induce the street railway company to construct its lines, a clause was inserted that it should only be required to pave 6½ inches on the outside of its tracks, and this was held to be valid notwithstanding a subsequent general statute requiring street railways to pave a larger space, but this was also an executed contract,

and in addition it was specifically pointed out in the case of *Chicago, Rock Island & Pacific Railway Co.* v. *Taylor*, 79 Okl. 142, 192 Pac. 349, where the Enid city case was relied upon, that the case did not involve the exercise of the police power of the state.

III.

The Railway Company not deprived of property with due process of law nor denied equal protection of the law by proposed crossing at Comanche Avenue.

The last contention of plaintiffs in error that by the proposed crossing at Comanche Avenue is deprivation of property without process of law and without compensation and is a denial of the equal protection of the law and that at the time the City of McAlester passed the Ordinance No. 74, that the city was not contracting away any existing police power, has been fully met and answered in the decisions of this court and of the Supreme Court of Oklahoma.

City of Cincinnati v. *Louisville & Nashville Railroad Co.*, 223 U. S. 390, 56 L. Ed. 481.

Northern Pacific Railway Co. v. *Minnesota, ex rel. City of Duluth*, 208 U. S. 583, 52 L. Ed. 630.

C. B. & Q. Railway Co. v. *Nebraska ex rel. City of Omaha*, 170 U. S. 57, 42 L. Ed. 948.

Coyle v. *Smith*, 221 U. S. 559, 55 L. Ed. 853.

Chicago, R. I. & P. Ry. Co. v. *Taylor*, 79 Okl. 142, 192 Pac. 349.

State of Georgia v. *City of Chattanooga*, .. U. S. .., 68 L. Ed. ...

Presumably plaintiffs in error rest this contention in part upon the proposition that by the Act of July 25,

1866, 14 Stat. 36, that the railway company has a fee title to its right of way. This claim is not conceded. In *Union Pacific Ry. Co.* v. *Kindred,* 43 Kans. 134, 23 Pac. 112, it was specifically held that under the grant of its right of way or easement from Congress that the company "does not own the fee." The materiality of this issue, however, is not perceived in the instant case as the Supreme Court of Oklahoma has specifically held with reference to this crossing that the right of way for Comanche Avenue must be taken by condemnation proceedings and compensation made before the crossing can be constructed and the question of title therefor, it is suggested, is immaterial except perhaps as to the amount of compensation to be determined in the condemnation.

The very ordinance in question concedes the power of condemnation existed at the date of the ordinance which was prior to statehood. In *City of Sapulpa* v. *Oklahoma Natural Gas Co.,* 79 Okl. 196, 192 Pac. 224, it was asserted that by virtue of the provisions of Mansfield's Digest that a gas franchise rate could not be changed subsequent to statehood without the consent of the City of Sapulpa. The contention was overruled and the court in passing upon the question said:

> "The status of towns within Indian Territory was stated by the Supreme Court of the United States in the case of *Farmers' & Mechanics' Savings Bank of Minneapolis* v. *Minnesota,* 232 U. S. 516, 34 Sup. Ct. 354, 58 L. Ed. 706, to be as follows:
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> "'The Indian Territory was not made an "organized territory," but by Section 31 certain

> general laws of the State of Arkansas, as published in Mansfield's Digest (1884), were put in force there until Congress should otherwise provide; among these the chapter relating to municipal corporations (Secs. 722-959).' "

The court then quotes Sections 754 and 755 of Mansfield's Digest, and further said:

> "Upon Oklahoma becoming a state, and Sapulpa becoming a part thereof, the State of Oklahoma became substituted in place of the United States, and Sapulpa then became a governmental agency of the State of Oklahoma. The State of Oklahoma has authorized the Corporation Commission to regulate and fix the rates of public utilities within the state, and when the Corporation Commission and the owner of the franchise mutually agreed upon a different rate from that fixed by the franchise, the same became binding and of full force and effect."

The State of Oklahoma upon its admission into the Union came in with the whole of the police power unimpaired and existing in all its fullness for the people of the state. This principle is very clearly vindicated in the case of *Coyle* v. *Smith, et al., supra,* wherein this court laid down and luminously developed the proposition that Congress could not by the imposition of conditions, in an enabling act, deprive the new state of any of those attributes essential to its equality and dignity and power with other states.

It is true that the Act of Congress granting the easement or right of way to the predecessor in title of the Missouri, Kansas & Texas Railway Co. did not in

terms onerate it with any of the burdens of the cost of establishing crossings. Neither did the act exempt it from such burdens. It may be safely asserted under the many decisions of this court, that Congress could not have so exempted it. It is a universal principle underlying all of the decisions that the police power which this court has said is essential to the life of the state, is held in trust and can neither be bargained or granted away. It is as essential to the perpetuity of the state as the blood to the animal life. All persons, corporate or otherwise, ~~taking~~ and holding title to land subject to the exercise of this power, and in cases of railway companies by virtue of their peculiar relation, they take it subject to the requirement of uncompensated construction and maintenance of crossings over their lines in order that travel and intercourse from one section of the country to another may not be obstructed. When Congress granted the right of way in question it held the police power of the unorganized Indian Territory in trust for the state if it should be created or for the exercise by itself, for it was subsequently so exercised, for railroads which would be built. Congress could not divest this power out of itself nor out of any future state which might be erected in Indian Territory. As so frequently observed throughout the decisions of this court and all of the courts, railway companies when they accept their charter or right of way, accept them subject to the exercise of this right. It is immaterial whether the crossings be established or the burdens imposed before the railway is built or afterwards.

Speaking with reference to this proposition, this court in *Northern P. R. Co.* v. *Minnesota, ex rel. Duluth, supra,* 208 U. S. (583, 596) said:

> "As the Supreme Court of Minnesota points out in the opinion in 98 Minn. 380, above referred to, the state courts are not altogether agreed as to the right to compel railroads, without compensation, to construct and maintain suitable crossings at streets extended over its right of way, after the construction of the railroad. The great weight of state authority is in favor of such right. See cases cited in 98 Minn. 380.
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> There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. In *New York & N. E. R. Co.* v. *Bristol,* 151 U. S. 556, 567, 38 L. Ed. 269, 272, the doctrine was thus laid down by Chief Justice Fuller, speaking for the court:"

Again in City of *Cincinnati* v. *L. & N. R. Co.,* 223 U. S. 390, 56 L. Ed. 481, *supra,* this court said:

> "That the dedication in 1789, and acceptance by the then Town of Cincinnati, constitute a contract with the dedicators, obligatory upon the town and its successor, the City of Cincinnati, may be conceded. The contention is that the Ohio act of May 9, 1908, now Sec. 3283a, Revised Statutes of Ohio, is an impairment of the contract, forbidden by the 10th section of the first article of the Constitution of the United States. But the right of

every state to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not perform their great functions * * * But the ordinance of 1787, as an instrument limiting the powers of government of the Northwest territory, and declaratory of certain fundamental principles which must find place in the organic law of states to be carved out of that territory, ceased to be in itself obligatory upon such states from and after their admission into the Union as states, except in so far as adopted by such states and made a part of the law thereof. This has been the view of this court, so often announced as to need no further argument. *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Permoli* v. *New Orleans*, 3 How. 589, 11 L. ed. 739; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 688, 27 L. ed. 442, 446, 2 Sup. Ct. Rep. 185.

"In the Escanaba & L. M. Transp. Co. case, it was said:

" 'Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is, "on an equal footing with the original states, all respects whatever," 3 Stat. at L. 536. Equality of constitutional rights and power is the condition of all the states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exer-

cise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River.'

"In *Coyle* v. *Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688, the case of *Escanaba & L. M. Transp. Co.* v. *Chicago*, and the cases cited therein, were fully reviewed and held applicable to conditions imposed by Congress in the enabling act under which Oklahoma was admitted, and all limitations in that act were held inoperative after admission, in so far as they had not been subsequently adopted by the state, and were in derogation of the equality in power of that state with the other states of the Union."

There are many other decisions of this court, most of which are cited in the opinion of the Supreme Court of Oklahoma in the case of *Chicago R. I. & P. Ry.* v. *Taylor*, 79 Okl. 142, from which a copious quotation is subjoined.

"Thus it will be seen that the state legislature onerated railroads with the duty of not only constructing crossings over the highways across that portion of its tracks and roadbed or right of way over which the public highway passed, but to 'maintain the same unobstructed, and in good condition for the use of the public, and to build and maintain in good condition all bridges and culverts that may be necessary on its right of way at such crossing.' * * * A franchise contract falls within the protection of Section 10, Art. 1, of the Federal Constitution, prohibiting states from impairing the obligations of a contract, and also within the protection of the fifth amendment to the Federal Constitution, prohibiting the taking of private property for public use without just compensation. Plaintiff in error contends that

under Section 9 of the Right of Way Act of Congress of March 2, 1887, the railway assumed no other burden with respect to highway crossings than the contractual obligation to 'construct and maintain continually all road and highway crossings and necessary bridges over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same'; and that therefore the act of the state legislature effective August 24, 1908, above quoted, violates the Federal Constitution in that it imposes upon the railway company the additional burden of maintaining the highway unobstructed and in good condition across the entire length of its right of way, instead of across that part of its right of way upon which its railroads were located.

"While not open to general use like streets and roads, railroads are public highways; they are *quasi* public institutions; the devotion of their property to the public use affects it with a public interest; and, while they are protected by constitutional limitations, they are peculiarly subject to be regulated by the state. These principles have been too long established to require the citation of authority. Article 9, especially Section 6 thereof, Williams' Oklahoma Constitution, is declaratory of these principles.

"Whether the railroad preceded or succeeded the construction of Watt Street, in El Reno, is not shown by the record, nor is it material. The obligation to construct and maintain safe crossings over streets and highways laid out before the construction of a railroad is imposed upon the railroad by the common law. *King* v. *Kent*, 13 East 220; *Boston & A. R. Co.* v. *City of Cambridge*, 159 Mass. 284, 34 N. E. 382; *Illinois Cent. R. Co.* v. *Copiah County*, 81 Miss. 685, 33 South. 502; *City of Bloomington* v. *Illinois Cent. R. Co.*,

154 Ill. 542, 39 N. E. 478; *Cleveland* v. *Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638; *Eyler* v. *Allegheny County*, 49 Md. 257, 33 Am. Rep. 249; *People ex rel. Bloomington* v. *Chicago & A. R. Co.*, 67 Ill. 118; *Dygert* v. *Schenck*, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; *Harriman* v. *Southern Ry. Co.*, 111 Tenn. 538, 82 S. W. 213; *State* v. *St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. * * * While some authorities (*Illinois Central R. R. Co.* v. *City of Bloomington*, 76 Ill. 447; *City of Bloomington* v. *Illinois Cent. R. R. Co.*, 154 Ill. 539, 39 N. E. 478), hold that the common law does not require a railroad company to maintain the highway laid out across its tracks after the construction of the railroad, it is firmly settled by the courts, in a long line of decisions, that the legislature, in the exercise of its police powers, may onerate railroad companies with the duty of maintaining crossings, although the street or highway was laid out subsequent to the construction of the railroad. *State* v. *St. Paul, M. & M. Ry Co.*, 98 Minn. 380, 28 L. R. A. (N. S.) 298, 124 Am. St. Rep. 581, 8 Ann. Cas. 1047, 8 Am. & Eng. Ann. Cases, 1047; *State* v. *St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313; *City of Milwaukee* v. *Chicago, M. & St. P. Ry. Co.*, 168 Wis. 534, 171 N. W. 54; *State ex rel. St. Paul* v. *Minnesota Transfer Ry. Co.*, 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; *City of Superior* v. *Roemer*, 154 Wis. 345, 141 N. W. 250; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269; *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 252, 41 L. ed. 979; *C. B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 42 L. ed. 948; *Northern Pacific Ry. Co.* v. *Duluth*, 208 U. S. 583, 52 L. ed. 630; *C. I. & W. Ry. Co.* v. *Connersville*, 218 U. S. 336, 54 L. ed. 1060, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co.* v. *Minneapolis*, 232 U. S. 430, 58 L. ed. 671. * * * In

the exercise of its police powers the state may require railroad corporations at their own expense not only to abolish grade crossings, but to build and maintain suitable bridges or viaducts to carry the street or highway across the railroad tracks. *Chicago, M. & St. Paul Ry.* v. *City of Minneapolis*, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. ed. 671; *Erie R. Co.* v. *Board of Public Utility Comrs.*, 89 N. J. Law, 57, 98 Atl. 13; *Public Service Ry. Co.* v. *Board of Public Utility Comrs.*, 89 N. J. Law 24, 98 Atl. 28; *Armour & Co.* v. *New York, N. H. & H. R. Co.*, 41 R. I. 361, 103 Atl. 1031. The second section of the act of Congress of March 2, 1887, under which plaintiff in error claims, granted 'a right of way one hundred feet in width through said Indian Territory (that was before Oklahoma Territory was organized), and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; provided, that no more than said addition of land shall be taken for any one station.' The plaintiff in error maintains a station in El Reno, and Watt Street crosses its tracks in its station grounds. If a railroad company is not protected by the Constitution from legislative acts burdening it with the duty of abolishing grade crossings, building and maintaining suitable bridges and viaducts at its own expense to carry a street or highway over its tracks and right of way, irrespective of whether such burdens were imposed by law at the time the company was incorporated or constructed, it is difficult to see how the act of the Oklahoma legis-

lature, effective August 24, 1908, onerating it with the duty of maintaining, unobstructed and in good condition for the use of the public, a highway clear across its entire right of way, impairs its contract or takes its property for public use without just compensation."

Plaintiffs in error adduce *Louisiana Public Service Commission* v. *Morgan's Louisiana etc. R. Co.*, 264 U. S. 393, that the Oklahoma Statutes are not broad or definite enough to authorize the order of the Oklahoma Corporation Commission. They do not point out wherein the Oklahoma Statutes are difficient in these respects. On the contrary the language appears to be comprehensive and explicit. Besides, the Supreme Court of Oklahoma has construed the particular law and held it applicable to the particular case at bar. It is unlike the decision of the Louisiana Supreme Court in *Gulf, C. & S. F. R. Co.* v. *Louisiana Pub. Serv. Commission*, 151 La. 635, 92 So. 143, wherein the court had held the Louisiana law applicable to the enforcement of an overhead crossing at the junction of a state highway with the railroad, and had nothing to do with municipal streets or crossings, and the state court's construction of the law did not in any way make the law applicable to matters pertaining to the "general control" of city streets or to municipal governmental functions, and therefore did not advise the Federal Supreme Court of the state court's construction of the statute in such respect.

It is therefore respectfully urged that the judgment of the Supreme Court of Oklahoma (*Missouri, K.*

& T. Ry. Co. v. *State of Oklahoma, et al.*, be affirmed or that a dismissal be entered herein of the writ of error. *Contributors to Penn. Hospital* v. *City of Philadelphia*, 245 U. S. 20, 24, 62 L. ed. 124, 128.

Respectfully submitted,

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